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**FEDERAL COMMUNICATIONS COMMISSION
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September 3, 2002

BY HAND DELIVERY

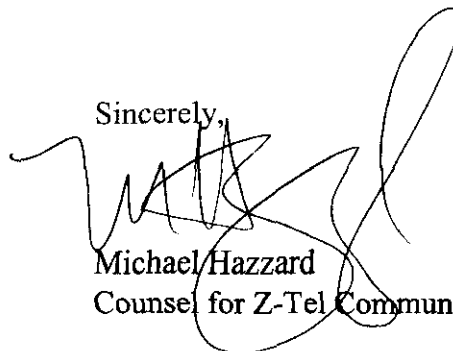
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, DC 20554

Re: Z-Tel Communications, Inc. Petition to Investigate and Toll the
SBC/Ameritech Merger Conditions Pending Investigation
(CC Docket 98-141)

Dear Ms. Dortch :

Enclosed for filing with the Federal Communications Commission, please find an original and fourteen (14) copies of Z-Tel Communications, Inc.'s Petition to Investigate the Public Interest Benefits of the Transfer and Toll the Expiration of Certain SBC/Ameritech Merger Conditions Pending Investigation. Please do not hesitate to contact me at (703) 918-2316 should you have any questions concerning this matter.

Sincerely,



Michael Hazzard
Counsel for Z-Tel Communications, Inc.

cc: Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of Matter of)
)
AMERITECH CORP.,)
Transferor,)
)
AND)
)
SBC COMMUNICATIONS INC.,)
Transferee)
)
For Consent to Transfer Control of)
Corporations Holding Commission Licenses)
And Line Pursuant to Sections 214)
And 310(d) of the Communications Act)
And Parts 5, 22, 24, 25, 63, 90, 95 and 101)
of the Commission's Rules)

CC Docket No. 98-141

**PETITION TO INVESTIGATE THE PUBLIC INTEREST BENEFITS OF THE
TRANSFER AND TO TOLL THE EXPIRATION OF CERTAIN SBC/AMERITECH
MERGER CONDITIONS PENDING INVESTIGATION**

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DATED: September 3, 2002

SUMMARY

Z-Tel Communications, Inc. ("Z-Tel"), hereby petitions the Commission to re-examine the public interest benefits of the transfer and to toll the sunset of the Merger Conditions imposed by the SBC/Ameritech *Merger Order* pending that review. Nearly three years have passed since the Merger Conditions were promulgated, and it is clear that the public interest benefits of those Conditions – in particular, the pro-entry Conditions and the out-of-region entry Conditions – have failed to materialize. Indeed, SBC/Ameritech has violated the pro-entry Conditions repeatedly. At the same time, SBC has failed to engage in out-of-region competitive entry in any significant sense. As a result, the public interest benefits of the Conditions have failed to materialize, and the Commission should act to advance the public interest before it allows any of the Conditions to expire.

In the Merger Order, the Commission stated that it would continue to ensure that the SBC/Ameritech merger advances the public interest. It is time to put that policy to the test. The Commission cannot allow any Merger Conditions to expire on October 8, 2002, in light of SBC's noncompliance. SBC/Ameritech's recalcitrance has violated the letter and spirit of the in-region pro-entry Conditions and no public interest benefits have materialized from SBC's out-of-region entry.

For these reasons, the Commission should grant Z-Tel's petition and toll the expiration of all SBC/Ameritech Merger Conditions pending Commission review of whether and to what extent: (1) public interest benefits have resulted from the merger of SBC and Ameritech and (2) the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the Merger Conditions.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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**PETITION TO INVESTIGATE THE PUBLIC INTEREST BENEFITS OF THE
TRANSFER AND TO TOLL THE EXPIRATION OF CERTAIN SBC/AMERITECH
MERGER CONDITIONS PENDING INVESTIGATION**

Z-Tel Communications, Inc. ("Z-Tel"), through its undersigned counsel, hereby petitions the Commission to re-examine the public interest benefits of the transfer and to toll the sunset of the Merger Conditions imposed by the SBC/Ameritech *Merger Order*¹ pending that review. Nearly three years have passed since the Merger Conditions were promulgated, and it is clear that the public interest benefits of those Conditions – in particular, the pro-entry Conditions and the out-of-region entry Conditions – have failed to materialize. Indeed, SBC/Ameritech has

¹ *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("Merger Order").*

violated the pro-entry Conditions repeatedly, as demonstrated by the periodic audit reports, FCC enforcement, and complaints by CLECs (including Z-Tel²). At the same time, SBC has failed to engage in out-of-region competitive entry in any significant sense. As a result, the public interest benefits of the Conditions have failed to materialize and the Commission should act pursuant to paragraph 360 of the *Merger Order* to advance the public interest before it allows any of the conditions to expire.

I. BACKGROUND

The Commission is required by law and its policies (articulated in paragraph 360 of the *Merger Order*) to re-examine the public interest benefits of the SBC/Ameritech Merger Conditions because those benefits have failed to materialize. The Commission should not and, indeed, cannot simply let the Conditions expire without ensuring that the public interest has been served.

In the *Merger Order*, the Commission concluded that the merger of SBC and Ameritech “threaten[ed] to harm consumers of telecommunications services in three distinct, but interrelated, ways.”³ Specifically the merger, as originally proposed, would:

- remove one of the most significant potential participants in local telecommunications mass markets both within and outside of the company’s region;⁴
- substantially reduce the Commission’s ability to implement the market-opening requirement of the 1996 Act by comparative practice oversight methods...., increase[ing] the duration of the entrenched firms’ market power and rais[ing] the costs of

² See, *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC et al.* EB-MD-0017 (filed Aug. 28, 2002).

³ *Merger Order* at 14717, ¶5.

⁴ The Commission defined the “mass market” to include “residential and small business” consumers. See *Merger Order* at 14746, ¶68; see also 14757, ¶93.

regulating them; and

- increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to advanced telecommunications services [, and thus] ... frustrate the Commission's ability to foster advanced services as it is directed to do so by the 1996 Act.⁵

After weighing these harms to consumers against the purported benefits asserted by SBC and Ameritech, the Commission concluded in no uncertain terms that "the asserted benefits of the proposed merger do not outweigh the significant harms."⁶

To "change the public interest balance"⁷ and overcome the identified "significant harms," the Commission imposed "significant and enforceable conditions designed to mitigate the ... harms of the[] merger, to open up the local markets of these ... RBOCs, and to strengthen the merged firm's incentive to expand competition outside its regions."⁸ The Conditions addressed what the Commission viewed to be the public interest harms of the merger, and fell into three general categories:

- In-Region Pro-Entry Conditions (Conditions 2-57). The Commission found that the merged firm would be better able to thwart CLECs from entering the local market in the SBC/Ameritech region. As a result, the Commission required SBC/Ameritech to provide the shared transport UNE,

⁵ *Id.* See also 14817, ¶236 (The Commission noted that "[w]e believe that this increased discrimination particularly will be aimed at, and harmful to, competitive providers of local exchange services to mass market customers (smaller businesses and residential customers).").

⁶ *Id.* at 14716, ¶3.

⁷ *Id.* at 14717, ¶4.

⁸ *Id.* at 14716, ¶2. See also 14743, ¶62 ("absent stringent conditions, we would be forced to conclude that this merger does not serve the public interest, convenience or necessity because it would inevitably retard progress in opening local telecommunications markets, thereby requiring us to engage in more regulation. Standing alone, without conditions, the initial application proposed a license transfer that would have been inconsistent with the approach to telecommunications regulation and telecommunications markets that the Congress established in the 1996 Act.").

implement a wholesale performance plan, create a separate affiliated for advanced services, and other conditions.

- Out-of-Region Competition Conditions (Conditions 59-61). As discussed above, the merger lessened actual and potential competition between SBC/Ameritech. SBC and Ameritech argued before the Commission that they needed to be “bigger” to finance aggressive entry in the other RBOC regions. The Commission remedied this public interest harm and attempted to lock-in these supposed out-of-region public interest benefits by requiring SBC/Ameritech to enter 30 markets as a CLEC in the following three years.
- Pro-Consumer Conditions (Conditions 62-65). The Commission found that the merger would interfere with the ability of state commissions and the Commission to benchmark quality of service. As a result, the Commission implemented several quality of service standards.

“Assuming satisfactory compliance,” the Commission determined the Merger Conditions would be “sufficient to tip the scales, so that, on balance, the application to transfer the lines should be approved.”⁹

In approving the merger, the Commission noted its continued obligation to advance the public interest. The Commission granted the merger “on the assumption and expectation that all conditions ... [would] remain effective and enforceable for 36 months, or the period specified in the condition if different.”¹⁰ The Commission went on to note that it expected “SBC/Ameritech [to] implement each of the[] conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of the[] conditions.”¹¹ Cautioning SBC to the necessity of absolute compliance with the Merger Conditions, the Commission warned:

⁹ *Id.* at 14718, ¶5.

¹⁰ *Id.* at 14858, ¶359.

¹¹ *Id.* at 14858, ¶360.

We expect that ... **all telecommunications carriers and the public are able to obtain the full benefits of these conditions.** If SBC/Ameritech does not fulfill its obligation to perform each of these conditions, pursuant to our public interest mandate under the Communications Act we must ensure that the merger remains beneficial to the public. **We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority, to ensure compliance with these conditions.** To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies. Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.¹²

After noting its eminent enforcement authority, the Commission went on to state that “the conditions contain **clear and specific language** defining SBC/Ameritech’s obligations,” and as such, the Commission would be able to “ensure that the Applicants have not proposed mere paper promises.”¹³

Nearly three years have passed, and it has become abundantly clear that SBC views its merger obligations as “mere paper promises” through its “systematic” flouting of its “clear and specific” obligations. Indeed, neither “telecommunications carriers” nor “the public” have been “able to obtain the full benefits of these conditions.”¹⁴ The Commission is under an obligation under the Communications Act to “ensure that the merger remains beneficial to the public,” and must reexamine the public interest at this point, before the expiration date.

For example, in Z-Tel’s experience – and as confirmed by this Commission and the state commissions – SBC has paid merely lip service to its shared transport obligation and its

¹² *Id.* (emphasis added).

¹³ *Id.* at 14921, ¶508 (emphasis added).

¹⁴ *Id.* at 14858, ¶360.

operations support systems' ("OSS") obligations.¹⁵ As a result, competitors are not enjoying the full benefits of the in-region pro-entry Conditions that the Commission required to offset the damage to competitors that the merger engendered.

At the same time, consumers are clearly not benefiting from the aggressive, out-of-region competition SBC/Ameritech promised. SBC's National/Local "strategy" – designed to "ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC – is an absolute non-event from a consumer perspective. Three years after the merger, the Commission expected that SBC Telecom would be a vibrant local competitor in thirty markets. SBC Telecom is instead a shell or, at best, a placeholder entity that is not competing aggressively at all.¹⁶ When the *Merger Order* was written, the Commission was counting on far more public interest benefits from SBC Telecom's out-of-region entry strategy. If SBC Telecom's non-existent entry strategy is what the Commission expects local competition to look like, then there are absolutely no public interest benefits to be had from these out-of-region entry conditions. Because those public interest benefits are lacking, the Commission *must* conduct a new public interest analysis to ensure that the merger "remains beneficial to the public" and in the course of doing so, the

¹⁵ Z-Tel notes that other carriers and consumers are likely the best source of information regarding SBC's compliance with conditions beyond those that Z-Tel avails itself of as a carrier that utilizes the UNE Platform, and the Commission should seek public comment on SBC's compliance with all of the various merger conditions for that reason. In addition, state public utility commissions and consumer groups would likely be the best source of information regarding public interest benefits to consumers, if any, that have resulted from the merger.

¹⁶ For example, on August 21, 2002, SBC stated that it "offers" residential local service in Washington, DC MSA. However, SBC sells only one residential voice product in Northern Virginia – a \$28/month local service (no long-distance), with no vertical features like voice mail or CallerID. Verizon sells a comparable residential package for \$9.33/month.

Commission should either implement stronger pro-competitive conditions or act to revoke authority and divest the two companies.

In the meantime, as elaborated below, the Commission, under no circumstance, should permit the expiration of any Merger Condition, pending the Commission's review and investigation of the current public interest benefits of the merger. The Commission's public interest review must seek comment from interested parties, such as consumers, state public utility commissions, and telecommunications carriers on: (1) public interest benefits have resulted from the merger of SBC and Ameritech, and (2) whether the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the Merger Conditions. If, based on that review, the Commission determines that the merger has not produced the relied upon public interest benefits, then the Commission should either: (1) "require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies" (as promised in 1999), (2) "revo[ke] ... the merged firm's section 214 authority," or, at a minimum, (3) extend and supplement the pro-competitive merger conditions to ensure that the expected public interest benefits are achieved.

II. EVIDENCE OF SBC'S NONCOMPLIANCE WITH THE IN-REGION MARKET-OPENING MERGER CONDITIONS IS LEGION

As stated by the Commission in the *Merger Order*, the SBC/Ameritech merger posed "significant potential public interest harms" by, among other reasons, increasing the combined company's ability to discriminate against competitors.¹⁷ The Merger Conditions were designed to mitigate the public interest harms; however, SBC has failed to comply with the

¹⁷ *Merger Order* at 14854, ¶348. See also 14819, ¶240 ("Discrimination against competitive providers of local exchange services is more likely to occur with respect to provision of such services to mass market customers than to larger business customers.").

Merger Conditions, sustaining forfeitures from the Commission, as well as complaints from state commissions.

The pattern of SBC's non-compliance with the in-region market-opening Merger Conditions is a trail of tears for CLECs that operate in the territory. While CLECs have been denied the pro-competitive benefits of benchmarking terms and conditions between the former SBC and Ameritech regions, the merged SBC/Ameritech has been able to stall and delay competitive entry in a region that accounts for over approximately 40% of the nation's telephone access lines. In particular, SBC/Ameritech has repeatedly violated the commitments it made to the Commission.

These and other violations have resulted in substantial penalty payments and forfeitures. Indeed, since the approval of the merger, SBC has been subject to nearly \$1,000,000,000 – yes, one billion dollars – in fines.¹⁸ Between August 2000 and May 2002, SBC has paid approximately \$66,000,000 as a result of Merger Condition violations.¹⁹ SBC has also been fined for its willful and deceitful treatment of its data filing obligations with the Commission, and state commissions have issued orders addressing SBC's manifest non-compliance. This Commission bears direct responsibility for creating this Frankenstein's monster of company, and the Commission must act to reign in this unrepentant corporate rulebreaker.

¹⁸ See "RBOC Fines and Penalties – SBC, Pacific Bell, Ameritech," Voice For Choices, <http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-42> (attached hereto as Exhibit A).

¹⁹ See *Notice of SBC Voluntary Payments Pursuant to Merger Conditions*, CC Docket No. 98-141 rel. Aug. 1, 2002. Payment figures are for August 2000 through February 2002. Since its payment in April 2002, SBC has made an additional three million (\$3,000,000) in payments as a result of violations of the merger conditions in January 2002 through May 2002.

In addition, as several periodic audits have shown, SBC has failed to comply with several other areas of the Conditions. The Commission has to date not publicly enforced CLEC requests to investigate and prosecute those violations. Indeed, the Chairman has stated that a lack of sufficient authority has made it difficult for the Commission to enforce those Conditions.²⁰ As a result, the public interest benefits that those Conditions were supposed to advance have not been realized. As a result, the Commission faces no choice but to reassess the public interest balance of the SBC/Ameritech merger at this time.

A. SBC's "Willful And Repeated" Failure To Satisfy The Shared Transport Condition 56

SBC has not complied with Condition 56 of the Merger Conditions for the entire three years it has been in effect. As a result, SBC has intentionally stalled competitive entry in its territories via UNE-P during this entire time. That delay has damaged CLECs to the tune of millions of dollars and has resulted in substantial consumer welfare loss in that time.

SBC/Ameritech's agreement to Condition 56 was a critical part of the Market-Opening Conditions in 1999. At that time, Ameritech was the *only* Bell operating company that was simply refusing to provide the shared transport UNE in its territory. This refusal had stalled competitive entry in the Ameritech region. Ameritech's refusal led to several state investigations, orders and arbitration awards, but Ameritech remained recalcitrant. The FCC issued a reconsideration in CC Docket No. 96-98 specifically rejecting Ameritech's position.²¹

²⁰ In testimony to the Senate Commerce Committee on July 30, 2002, Chairman Powell stated, "In our call for stronger enforcement to punish wrongdoing of incumbent local exchange carriers that violate merger conditions...we are calling for regulatory power to aid in enforcement efforts....[We] want more of that authority to do so effectively." Hearing of the Senate Commerce, Science and Transportation Committee, *Financial Turmoil in the Telecom Marketplace*, July 30, 2002, Panel I, tr. at 33 (Chairman Powell).

²¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio*

Indeed, Ameritech's refusal to comply with the law caused the Commission to reject Ameritech's Section 271 application for the state of Michigan in August 19, 1997.²² Within a year, SBC and Ameritech sought Commission approval for their mega-merger.²³

Due in large part to Ameritech's historical refusal to provide UNE shared transport in accordance with the Commission's rules, the Commission decided to require the merged company to end Ameritech's restiff policy. To do so, the Commission required SBC to "import" into the Ameritech region, the most favorable version of UNE shared transport that SBC was required to offer in Texas as of August 27, 1999:

SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (more favorable than) the *most favorable terms* SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999.²⁴

SBC recently discussed the purpose of this condition:

Prior to the SBC/Ameritech merger, *Ameritech – virtually alone among incumbent LECs – had steadfastly refused to permit CLECs to use shared transport for local exchange services and exchange access. The SBC/Ameritech Merger Conditions provided the Commission with an opportunity to resolve that issue, and bring Ameritech in line with the industry.*

* * *

Accordingly, the Commission recognized that Ameritech was committed to fighting shared transport and that, even if the

Service Providers, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997).

²² *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997).

²³ *Merger of SBC Communications Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations*, CC Docket 98-141 (filed July 24, 1998).

²⁴ *SBC Ameritech Merger Order*, Appendix C, ¶56 (1999) (emphasis added).

Commission promulgated a shared-transport obligation in the near-term, Ameritech might take *months or even years* to implement it.²⁵

Despite SBC's clear obligation to make such UNE shared transport available, SBC has failed to live up to its federal merger condition.

On January 18, 2002, the Commission released a Notice of Apparent Liability ("NAL") for Forfeiture against SBC for violating the Merger Condition 56 by not offering shared transport in each of the five former Ameritech states under terms offered in Texas.²⁶ The Commission concluded that SBC should be fined \$6 million dollars for its violation. The Commission held that, "subsequent to the effective date of the merger conditions, SBC apparently attempted to restrict or prohibit the use of shared transport for routing intraLATA toll calls in the Ameritech states."²⁷ The NAL found it "**particularly egregious** that SBC refused to make shared transport available on the same terms available in Texas"²⁸ even after the Texas Commission made it "abundantly clear what SBC's obligations under its interconnection agreement were."²⁹

Several lessons can be drawn from Ameritech's refusal to offer shared transport. The first lesson is that the regulatory process can be persistently ignored by an incumbent preferring profit to compliance. Indeed, the shared transport debate continues to this very day, and the FCC has not completed its investigation under the NAL.

²⁵ Response of SBC Communications, Inc. to Notice of Apparent Liability for Forfeiture, Federal Communications Commission File No. EB-01-IH- 0030, March 5, 2002 ("SBC NAL Response"), 1-2 (emphasis added).

²⁶ *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-01-1H-0020, NAL/Acct. No. 200232080004 (Jan. 18, 2002) ("*Shared Transport NAL*").

²⁷ *Id.* at ¶7.

²⁸ *Id.* at ¶22 (emphasis added).

²⁹ *Id.* Z-Tel and CoreComm have filed a § 208 Complaint to recover damages from SBC's violation.

It is clear that SBC always intended Merger Condition 56 to be a “paper promise.” In a recent meeting with no less than Chairman Powell, SBC has argued there was no “meeting of the minds” between SBC and Commission staff on the meaning of the shared transport obligation.³⁰ Such bald assertions, standing alone, directly (1) contradict the Commission’s unambiguous finding that “the conditions contain clear and specific language defining SBC/Ameritech’s obligations” and (2) undercut the Commission’s ability to “ensure that the Applicants have not proposed mere paper promises.”³¹

Indeed, SBC’s assertions are “particularly egregious” when one recognizes that SBC continues to be reprimanded for shared transport violations by the state public utility commissions and the courts. The Illinois Commerce Commission had this to say about SBC’s shared transport compliance in an October 2001 Order:

We find Ameritech’s argument [that the ICC should not investigate its lapsed shared transport tariff offering] **wholly disingenuous** and designed to stave off the inevitable conclusion that Ameritech’s [shared transport] offering fails to comply with our prior orders. **The real question is not whether it complies with our prior orders, but how many of our prior orders it defies.**

...

Our Merger Order expressly required Ameritech to import to Illinois the rates agreed to in Texas for interim shared transport. We gave Ameritech the option of filing Illinois-specific rates *provided the rates are reasonably comparable to the importation of Texas rates*. **Instead, Ameritech filed a tariff with rates that are more than 16 times higher than Texas rates.**

...

... Ameritech’s noncompliance is more egregious than just violating the Merger Order. The rates filed by Ameritech for [shared transport] were also inconsistent with the shared transport cost study originally filed with us by Ameritech in compliance with our TELRIC Order. This shared transport cost study

³⁰ Letter from Michael B. Hazzard, Counsel to Z-Tel, to Lisa Griffin and Lia B. Royle, File Nos. EB-01-MD-017 and EB-01-1H-0030, July 12, 2002 (attached hereto as Exhibit B).

³¹ *Merger Order* at 14921, ¶508.

demonstrated that the Texas rates we required Ameritech to import were not only accurate, but almost identical to the shared transport rate originally calculated by Ameritech.

...

Thus, we conclude that Ameritech's [shared transport] offering failed to comply with our Wholesale Order, our TELRIC Order, our Merger Order, Ameritech's own shared transport cost study, and Ameritech's own prior sworn statements[.]³²

SBC's "compliance" with its *voluntary* commitments runs from coerced at best to nonexistent at worst.

The Illinois Commission's decision echoes decisions throughout the former Ameritech states. As one example, the Michigan Public Service Commission has ordered SBC/Ameritech to provide shared transport under both federal law, state law and the Merger Conditions, and Ameritech has resisted all of those attempts.³³ Ameritech recently sued the Michigan Commission to overturn that decision (despite its clear Merger Condition obligation to comply.) Those efforts failed on August, 12, 2002, when the federal district court for the Eastern District of Michigan upheld that Michigan Public Service Commission's order requiring SBC's Ameritech Michigan operating company to permit CLECs to use the shared transport UNE to provide intraLATA toll service to end users.³⁴ In that case, the court concluded that the Michigan Commission "correctly interpreted the [FCC's] Merger Approval Order, the [FCC's]

³² *Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues*, ICC Docket No. 98-0396, 65-67 (Oct 16, 2001).

³³ *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Case No. U-12622, Order (March 19, 2001)

³⁴ *Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle et al.*, Case No.: 01-CV-71517, Slip Op. 2 (EDMI Aug. 12, 2002).

UNE Remand Order, and the Texas Birch Decision [requiring] shared transport for intraLATA calls.”³⁵ The Court cited extensively the Commission’s NAL on this issue.

SBC’s “particularly egregious” defiance of the shared transport merger condition – without more – demands that the Commission toll the expiration of this Market-Opening Merger Condition pending a plenary investigation of whether public interest benefits of the merger have been realized. The fact is that SBC/Ameritech has openly and notoriously failed to comply with this condition during the past three years.³⁶ To let the condition expire quietly – unenforced by a Commission that claims publicly to be committed to enforcement – would make a mockery of the Commission’s public interest analysis and be a slap in the face to state commissions and new entrants in the SBC/Ameritech territory.

B. SBC’s General OSS Shortcomings And Failure to Report Accurate Performance Data

Like the shared transport Merger Condition 56, one of the purposes of the OSS Conditions was to bring Ameritech’s OSS up to snuff. In 1997, the FCC rejected Ameritech Michigan’s 271 application on the basis of inadequate OSS.³⁷ Ameritech never tried to show 271 compliance again and instead agreed to merge with SBC. While that merger was pending,

³⁵ *Id.*, 18.

³⁶ Indeed, not only has SBC flouted its shared transport obligation in the Ameritech states, it has affirmatively attempted to export Ameritech’s restriction on shared transport to other states, including Arkansas, California, Kansas, Missouri, and Oklahoma. Z-Tel was successful in thwarting SBC’s efforts in Arkansas, Kansas, Missouri, and Oklahoma through the federal 271 process, however, outstanding issues remain in California.

³⁷ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶128 (1997) (“We conclude that Ameritech has not demonstrated that the access to OSS functions that it provides to competing carriers for the ordering and provisioning of resale services is equivalent to the access it provides to itself.”).

SBC received approval for its 271 application in Texas – in which the Commission decided that SBC's OSS, in Texas, was adequate.

Three years later, the Ameritech OSS is still found wanting. For example, on June 17, 2002, KPMG (SBC-Ameritech's OSS auditor) noted in a report to the ICC that "413 specific [OSS] defect report have been provided to the ICC and SBC Ameritech."³⁸ In that report, KPMG enumerated some of the "most important remaining problems" that include:

- SBC Ameritech does not accurately update Customer Service records;
- SBC Ameritech's systems did not provide timely or accurate responses during pre-order/order volume testing;
- SBC Ameritech has not provided proper Line Loss Notifications;
- SBC Ameritech has made incorrect directory assistance updates;
- SBC Ameritech's end-to-end maintenance and repair process does not ensure trouble reports are handled consistently, accurately and completely;
- Orders have not flowed through SBC Ameritech EDI systems as expected; and
- SBC Ameritech EDI systems have not provided service order completions on confirmed due dates.³⁹

In short, SBC Ameritech's OSS is still broken, and three years of the OSS Merger Conditions have not provided the incentive for SBC to fix problems that have long existed in the Ameritech states.

³⁸ KPMG Consulting, SBC Ameritech OSS Evaluation Interim Report (June 17, 2002), attached hereto as Exhibit C. KPMG is the testing agent throughout the five-state region that comprises the former Ameritech region, and the enumerate OSS failures apply with equal force across all former Ameritech states.

³⁹ *Id.*

Indeed, the Ameritech OSS is so sub-standard that the only BOC region without a pending 271 application for any state is the Ameritech region. Since the Commission approved the SBC/Ameritech merger, in October 1999, SBC has sought 271 authority for six states, all of which are in the original SWBT territory.⁴⁰ SBC's failure to seek 271 authority for even a single state in the Ameritech region can only be due to the plain fact that SBC believes that neither state public utility commissions nor the Commission can now conclude it will pass the checklist for any state. To the contrary, SBC's/Ameritech's local competition implementation and checklist compliance has been deplorable as demonstrated by the number of orders issued by this Commission and various state public utility commission addressing SBC's failure to comply with the *Merger Conditions*, among other statutory and regulatory requirements that require SBC to open its network on a nondiscriminatory basis.

The OSS problems and Condition violations are not limited to the Ameritech region. As early as December 2000, just over a year after the SBC/Ameritech merger was approved, SBC was fined (a paltry) \$88,000 for failing to accurately report performance data.⁴¹ There, the Commission found that for thirteen months, SBC failed to report performance measurement data for Texas, Oklahoma, Kansas, Missouri, Arkansas, California and Nevada.⁴² SBC had failed to report accurate performance data for important measurements such as Firm Order Confirmations, Response Time for OSS Pre-Order Interfaces, Order Process Flow

⁴⁰ The Commission approved SBC's Texas 271 application on June 30, 2000. The Commission approved SBC's Kansas and Oklahoma 271 application on January 22, 2002. The Commission approved SBC's Arkansas and Missouri 271 application on November 16, 2001 (citations omitted).

⁴¹ *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-00-IH-0432, NAL/Acct. No. 200132080011 (Dec. 20, 2000). See also, *SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order, (Mar. 15, 2001).

⁴² *Id.* at ¶9.

Through, and Missed Due Dates, among other things.⁴³ These categories of performance measurements are essential to CLECs' success in the local market, yet SBC without question at best paid lip service to these obligations.

C. Audit Reports of SBC's Compliance Have Uncovered Multiple Violations of the Conditions that the Commission has Failed to Publicly Enforce

Each of the successive audit reports provided under the Merger Conditions have reinforced the plain fact that SBC simply has not lived up to its promises to the Commission. As a result, neither consumers nor competitors have obtained the benefits that the Commission relied upon finding that the merger was in the public interest. Indeed, periodic audit reports have uncovered repeated violations. The attached table, compiled by CompTel, documents these issues.⁴⁴

The evidence points to significant documentation. In its December 29, 2000 audit, numerous Merger Condition violations were identified related to SBC's advanced services affiliate. For example, SBC failed to treat its advanced services affiliate on an arm's length basis (shared office space, shared executives, etc.). SBC filed collocation applications on its affiliate's behalf. SBC failed to comply with Rule 51.321(h) of the Commission's collocation rules concerning timely reporting of exhausted collocation space. SBC developed an ordering system on behalf of its advanced services affiliate. This audit report resulted in the issuance of a Notice of Apparent Liability for the collocation issues, yet issues related to improperly aiding its advanced service affiliate remain outstanding.⁴⁵

⁴³ *Id.* at ¶12.

⁴⁴ FCC Complaints Concerning RBOC Merger Violations Chart Prepared by CompTel (attached hereto as Exhibit D).

⁴⁵ In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326a (rel. May 24, 2001).

The Commission has taken public action on some, but not all of these violations. In October 2001, the Commission fined SBC \$2,520,000, the statutory maximum, for, among other things, failing to notify the Commission within 30 days that information in affidavits included in its 271 applications was inaccurate, as well as making material misrepresentations.⁴⁶ One month later, in November 2001, the Commission issued a Notice of Apparent Liability for Forfeiture against SBC for failing to file a sworn statement in response to an Enforcement Bureau investigation.⁴⁷ In that investigation, SBC had, in response to a letter of inquiry from the Commission, informed the Commission it was unable to identify ISP customers from its other DSL customers. Nevertheless, in the Computer III Further Remand proceedings, SBC attached data it generated distinguishing between SBC's ISP and other DSL customers.⁴⁸ Consequently, the Commission asked for a sworn statement from SBC explaining the discrepancy in SBC's positions, which SBC failed to provide and thus was fined (an obviously inadequate) \$100,000.⁴⁹

Myriad other issues remain open, including many related to SBC's Year Two Merger Audit, completed September 4, 2001. For example, on January 24, 2002, CompTel filed materials with the Commission demonstrating SBC's failure to: (1) comply with the provisions of the Carrier-to-Carrier Performance Plan; (2) provide required promotion discounts to non-affiliated carriers, including CompTel member ATG; and (3) comply with the FCC's collocation rules and overcharged ATG for collocation space. All of these issues remain open except for one

⁴⁶ *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-01-1H-0339, NAL/Acct. No. 200132080059 (Oct. 16, 2001).

⁴⁷ *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-01-iH-0642, NAL/Acct. No. 200232080001 (Nov. 1, 2001). See also *SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order (Apr. 15, 2002).

⁴⁸ *Id.* at ¶¶2-6.

⁴⁹ *Id.* at ¶1.

(the 100 percent cap on the percentage by which SBC misses a performance benchmark under the Carrier-to-Carrier Performance Plan), which the Common Carrier Bureau declined to enforce earlier this year in a February 6, 2002 letter to SBC.⁵⁰

As noted by the Commission, “inaccurate reporting of performance data may compromise the effectiveness of the merger conditions in promoting open local markets.”⁵¹

SBC’s noncompliance with these and a number of other reporting requirements contained in the SBC/Ameritech *Merger Order* demonstrates systematic noncompliance of the type that warrants use by the Commission of “every available enforcement mechanism.”⁵²

* * *

In summary, SBC/Ameritech has failed to live up to the end of the bargain it struck with the Commission in October 1999. In the face of a Commission determination that the merger was not in the public interest because it would harm competition, SBC and Ameritech agreed to many Conditions that were designed to facilitate further entry by CLECs in the SBC/Ameritech region. Those Conditions were particularly geared to improving wholesale offerings (like shared transport) and performance in the Ameritech states. As discussed above, SBC/Ameritech has not provided those pro-competitive public interest benefits. But while SBC/Ameritech has enjoyed the fruits of this anticompetitive merger for the last three years, entrants and consumers have not enjoyed the pro-competitive benefits of the Merger Conditions.

⁵⁰ Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau to Caryn D. Moir, SBC, ASD File No. 99-49, Feb 6, 2002 (attached hereto as Exhibit E).

⁵¹ *Id.* at ¶15.

⁵² *Merger Order* at 14585, ¶360.

III. SBC'S NATIONAL LOCAL STRATEGY HAS NOT BROUGHT THE BENEFITS OF COMPETITION FROM A MAJOR INCUMBENT LEC "TO BUSINESS AND RESIDENTIAL CUSTOMERS"

On August 21, 2002, SBC filed a "compliance" letter claiming that SBC had fulfilled all of its "Out-of-Region Competitive Entry" requirements.⁵³ By its filing, SBC also asserts that its "Out-of-Region Competitive Entry" requirements now "sunset."⁵⁴ In other words, SBC asserts that its three page letter filing puts a definitive end to its out-of-region entry obligations. So far as Z-Tel is concerned, SBC has made nothing more than a paper effort to "offer" competitive services, with no attendant public interest benefits. The Commission now needs to examine whether consumers are enjoying the public interest benefits of SBC's "entry" that the Commission expected in 1999. If not, the entire public interest balance of the merger needs to be reexamined.

In stark contrast to the reality that has emerged, SBC and Ameritech claimed that its "National Local Strategy" was "the essentially simultaneous, facilities-based entry of the combined company into each of the Top 30 major U.S. markets outside of the area in which the combined company would be the incumbent carrier."⁵⁵ Describing the National/Local Strategy's public interest benefit, the FCC stated that its condition:

will **ensure** that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to **redeem their promise** that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive

⁵³ Letter from Caryn D. Moir, SBC to Marlene H. Dortch, FCC, CC Docket 98-141 (Aug. 21, 2002).

⁵⁴ *Id.*

⁵⁵ *Merger Order* at 14826, ¶259; *see also* SBC/Ameritech Application at 5 (July 24, 1998).

entry into the SBC/Ameritech region by the affected incumbent LECs.⁵⁶

In spite of this clear expectation, the National/Local Strategy has done nothing to redeem SBC/Ameritech's promise that their merger would spark competition both in the combined region and outside of the combined region. In fact, SBC has only engaged in the National/Local Strategy to "fulfill [its] merger commitment" and its service offerings include only voice services. SBC states that it will only enter the large business "enterprise" market when it has Section 271 authority.⁵⁷ SBC provides no explanation as to how its failure to obtain Section 271 authority in California, Nevada and the Ameritech region hinders its ability to provide mass market local services to consumers in Washington, DC, where it has ostensibly deployed a circuit switch.

SBC's "implementation" of its National/Local Strategy at best has been on a lip service basis. SBC's National/Local "rollout" in Atlanta, Georgia best demonstrates SBC's commitment to out-of-region competition. On February 14, 2001, SBC launched local telecommunications service in Atlanta. In the press release announcing the new services available, SBC stated:

Business and consumers throughout Atlanta can now choose a **telecommunications provider that isn't all talk**. As part of an aggressive national expansion plan, SBC Communications, one of the world's leading telecommunications companies and recently named America's most admired telecommunications company by Fortune, is now offering local service in Atlanta through SBC Telecom.⁵⁸

⁵⁶ *Merger Order* at 14877, ¶398 (emphasis added); *see also* SBC/Ameritech Application at 17.

⁵⁷ The Real Story on Bell Out-of-Region Competition, Xchange, September 2002 (attached hereto as Exhibit F).

⁵⁸ SBC Launches Telecommunications Service in Atlanta, February 14, 2001 (attached hereto as Exhibit G).

In reality, SBC's commitment to the Atlanta market was "all talk." SBC did not issue a press release only 15 days later when, according to the Atlanta Journal Constitution, it "quietly fired its 40-person staff and gave up the fight."⁵⁹ SBC became smarter with its successive National/Local rollouts. Gone were the press releases and the large pronouncements. Indeed, SBC no longer makes anything at all of its National/Local rollout, as it apparently rolled out in 27 markets this year with nary a whimper of publicity or advertising.

At bottom, rather than "redeem its promise," SBC has offered nothing but lip service commitment to its much fan-fared National/Local Strategy. Indeed, far from bringing "residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC," SBC has merely made paper filings to satisfy what at best has become a "paper promise" of the type the Commission claimed it was avoiding in approving the merger.⁶⁰

In fact, SBC's switch-based, out-of-region performance perhaps demonstrates, at best, that access to unbundled local switching is absolutely essential to deploying competitive mass-market service. SBC ostensibly has switched in 30 MSAs, but its mass-market offering is noncompetitive.⁶¹ Either SBC has decided that it cannot succeed in offering switched-based mass-market services alone, or perhaps it has tactically colluded with other BOCs to not compete out-of-region for these customers. Only SBC (and perhaps its BOC brethren) knows the answer to this question. To advance the public interest, the Commission should find out the answer.

SBC promised the Commission that it would provide residential and business consumers with "the benefit [of] facilities-based competitive service by a major incumbent

⁵⁹ SBC Retreats from Atlanta, The Atlanta Journal-Constitution (Mar.3, 2001) (attached hereto as Exhibit H).

⁶⁰ *Merger Order* at 14921, ¶508.

⁶¹ *See supra* note 15.

LEC.”⁶² This simply has not occurred, and although paper compliance may satisfy a paper promise, consumers have obtained no benefit. Thus, contrary to the Commission’s expectation, “the public” has not been “able to obtain the full benefits of these conditions.” The Commission simply must act to investigate – with public notice and comment – the public interest benefits, if any, that have resulted from SBC’s “National Local” deployment. With little or no public benefit having occurred, the Commission must take action to ensure that the merger remains in the public interest.

IV. CONCLUSION

In paragraph 360 of the Merger Order, the Commission stated that it would continue to ensure that the SBC/Ameritech merger advances the public interest. It is time to put that policy to the test. The Commission cannot allow any Merger Conditions to expire on October 8, 2002, in light of SBC’s noncompliance. As the Commission stated in the *Merger Order*, “[w]e expect that SBC/Ameritech will implement each of these conditions in full, in good faith, and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions.”⁶³ For a host of reasons, local competition has not benefited from the SBC/Ameritech merger. SBC/Ameritech’s recalcitrance has violated the letter and spirit of the in-region pro-entry Conditions and no public interest benefits have materialized from SBC’s out-of-region entry.

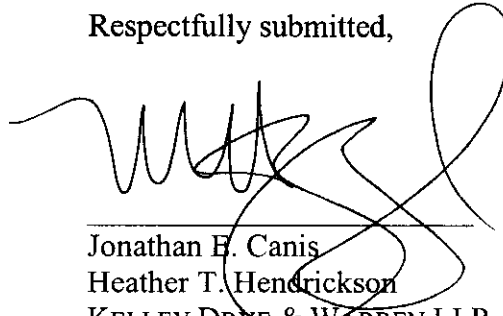
For the reasons stated above, the Commission should grant Z-Tel’s petition and toll the expiration of all SBC/Ameritech Merger Conditions pending Commission review of whether and to what extent: (1) public interest benefits have resulted from the merger of SBC

⁶² *Merger Order* at 14877, ¶398 (emphasis added); *see also* SBC/Ameritech Application at 17.

⁶³ *Merger Order* at 14858, ¶360.

and Ameritech and (2) the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the Merger Conditions.

Respectfully submitted,



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